Supreme Court, U.S.
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No. 91-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DR. SIDNEY S. LOXLEY,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, AND OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY

LAWRENCE P. POSTOL, ESQ.
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
815 Connecticut Avenue, N.W.
Washington, DC 20006-4004
(202) 463-2400

Counsel for Respondent Newport News Shipbuilding and Dry Dock Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was substantial evidence in the record to support the Administrative Law Judge's finding of fact that Dr. Loxley's charges exceed the statutorily prescribed limit, in the Longshore Act, that a medical provider's charges not exceed the rates which "prevail in the community," 33 U.S.C. § 907(g)?

2. Whether the Administrative Law Judge correctly held that the proceeding before him was de novo, and thus Dr. Loxley, as the party seeking a compensation order, bore the burden of proof (since the Administrative Law Judge held that the Employer met the burden of proof, even if the Employer bore the burden of proof, this issue may be moot)?

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent Newport News Shipbuilding and Dry Dock Company notes that it's parent corporation is Tenneco.

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The Respondent-Employer, the Newport News Shipbuilding and Dry Dock Company, by its counsel, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals For The Fourth Circuit (hereinafter referred to as "Dr. Loxley's Petition").

STATEMENT OF THE CASE

This case involves the application of section 7 of the Longshore and Harbor Workers' Compensation

Act, which limits the fees of medical providers to "such charges as prevail in the community for such treatment. . . ." 33 U.S.C. § 907(g). The reason for this limitation is that the employer has no control over the doctor an injured worker chooses, and yet the employer is liable for the doctor's fee.

Section 7 provides that the prevailing rate limitation "shall be subject to regulation by the Secretary [of Labor.]" *Id.* The Secretary of Labor issued regulations providing for a factual recommendation by the Deputy Commissioner, but then a *de novo* hearing before an Administrative Law Judge. 20 C.F.R. § 702.413-415. This is exactly how *all* Longshore Act factual disputes are resolved. The Deputy Commissioner holds an informal conference, without any discovery or any record being made, the Deputy Commissioner makes an *informal recommendation*, and then any party can demand a *de novo* hearing before an Administrative Law Judge. 20 C.F.R. § § 702.316-318, 702.332, 702.344 (referred to as Subpart C). The Judge's decision is then binding if there is substantial evidence to support it. 33 U.S.C. § 921.

Since there is no statutory or regulatory definition of the prevailing rate, the Administrative Law Judge must accept evidence on the issue, and make a factual determination. The Employer in this case used the statistical base of its self-insured health benefits plan for its evidentiary presentation. Being a large employer (largest private employer in Virginia), the Employer herein had an enormous statistical base—1700 local doctors. In terms of a cut-off for "prevailing," the Employer used the generous definition in its health insurance plan—80th percentile (as compared to the average or common charge which would be

much lower). Thus, if a doctor's charge was less than what 8 out of 10 doctors in the area charged for the same treatment, the charge was considered within the prevailing rate and was paid in full (Appendix at 60-61, 78-80).

SUMMARY OF THE ARGUMENT

The decision below merely dealt with the adequacy of the Employer's statistical evidence in establishing prevailing rates for medical charges. It is agreed by the parties and beyond dispute that the doctor's charges are statutorily limited to the prevailing rate. Thus, the decision below was inherently factual—establishing the prevailing rate in the community for similar medical care. Moreover, the decision was the first ruling by a Court of Appeals on this issue. As such, this case is not worthy of this Court's review.

The Court of Appeals put the burden of proof on the medical provider in cases in which the doctor alleges he was not paid pursuant to the prevailing rate. That ruling was merely a recognition that under the Secretary of Labor's regulations, the hearing before the Administrative Law Judge is *de novo*, and thus under the Administrative Procedure Act, 5 U.S.C. § 556, the party asking for an award, *i.e.*, money, bears the burden of proof. Moreover, the Administrative Law Judge found that even if the burden of proof was on the Employer, the Employer herein met the burden of proof. Thus, if the decision is upheld under the substantial evidence test, the burden of proof issue would never be reached.

The Court of Appeals itself recognized the limited importance of this case, voting 8-1 to deny Dr. Loxley's petition for rehearing in banc.

ARGUMENT

I. THE PREVAILING RATE LIMITATION OF THE LONGSHORE ACT FOR A MEDICAL PROVIDER'S CHARGE MERELY INVOLVES A FACTUAL ISSUE AND THUS IS NOT WORTHY OF THIS COURT'S REVIEW

Dr. Loxley, in his Petition, argues that the decision below mandates that an employer's health benefit plan limitations be applied under the Longshore Act. There was no such ruling by the Administrative Law Judge, Benefits Review Board, or the Court of Appeals. Rather, the Court of Appeals merely held that in the absence of a statutory or regulatory definition of prevailing rate, the question of determining the prevailing rate was an inherently factual issue. The Court of Appeals then merely accepted the Administrative Law Judge's findings of fact, which determined that the employer's evidence of prevailing rates was reasonable and was more credible than the doctor's evidence:

> Because the Act and regulations give no guidance on how to ascertain the prevailing rate, employers must devise their own means of doing so. Absent more definitive directions for determining the prevailing rate, we believe that an administrative law judge's conclusion that the employer met its burden of defining such a rate should be given great credence by the Board. *The evidence submitted at the hearing sufficiently supported the finding of the administrative law judge that NNS sustained its burden of proving the prevailing rates.*

Appendix at 16 (emphasis added).

The Court of Appeals did not hold that the employer's evidence from a health insurance plan is binding. Indeed, the Court of Appeals did not limit in any way the kind of evidence the doctor can submit to refute the employer's evidence:

> In making this conclusion as to the burden of proof, *we do not purport to determine how a physician should or could sustain this burden at an administrative hearing*. In the context of the record before us, however, we find that Loxley did not offer sufficient evidence to prove that his charges fell within the prevailing rate. As previously discussed, *Loxley offered little if any useful information as to what constitutes the prevailing rate. At the hearing, he did not offer any evidence attacking the methodology used by NNS*. Although Taylor testified that he thought the resulting prevailing rates were low, when asked whether he "had a particular problem" with the use of the 80th percentile, he responded, "I don't, personally, and I don't think the peer review group has any problem with that."

Appendix at 22 (emphasis added).

Neither the Administrative Law Judge, nor the Court of Appeals, set out a mandatory definition of prevailing rate. Rather, merely for convenience, the Employer used its statistical data from its health insurance plan. Similarly, in the absence of a definition of "prevailing," the Employer used the generous definition in its health insurance plan—80th percentile. The Administrative Law Judge merely accepted this

information as reasonable in the absence of any contrary convincing evidence from Dr. Loxley.

Dr. Loxley in his Petition raises three complaints as to the factual findings, but each were addressed and rejected by the Administrative Law Judge and the Court of Appeals. First, Dr. Loxley complains of the 80th percentile cutoff as being arbitrary. However, since it is greater than the most common charge or average charge, the Administrative Law Judge was free to use it as evidence of the prevailing rate (Appendix at 10 and 71-72, 110). As the Court of Appeals noted, even Dr. Loxley's own witness, Dr. Taylor, did not have a problem with the 80th percentile cutoff (Appendix at 6).

Dr. Loxley also complains of the use of the prior year's data, but the Administrative Law Judge and the Court of Appeals held that its use was necessary as a practical reality. (Appendix at 15n.8 and 111-112). Moreover, the use of the generous 80th percentile more than offsets the one year delay in the data.

Finally, Dr. Loxley requested differentiation by specialization. The Administrative Law Judge and Court of Appeals rejected this request because the American Medical Association ("AMA") coding, and the Longshore Act, do not so differentiate, there is no accepted list of specialists, and when the Employer tried to differentiate by use of the yellow pages' listing of orthopedists (the only available, and obviously crude, means of identification of specialization),there was no change in the outcome (Appendix at 10-14 and 97-101).

Dr. Loxley did offer the opinion of his fellow orthopedist, Dr. Taylor. Dr. Taylor, however, could pro-

vide no foundation for his opinion, conceding that he could not state any doctor's charges for the three medical care services at issue in this case, not even Dr. Taylor's own charges (Appendix at 5-6, 73-78, 103-104).

The mere recital of Dr. Loxley's complaints demonstrates that they involve factual issues. As such, Supreme Court review is not warranted. This is especially the case herein where no other Court of Appeals has addressed this issue.

II. THE BURDEN OF PROOF WAS PROPERLY PLACED ON DR. LOXLEY SINCE THE HEARING WAS DE NOVO AND IT WAS DR. LOXLEY WHO WAS SEEKING A COMPENSATION ORDER

The Court of Appeals accurately and properly addressed the burden of proof issue, relying on the fact the hearing before the Administrative Law Judge was *de novo*, and it was Dr. Loxley who was requesting a compensation order. The Court also noted that the regulations make the doctor, but not the employer, a necessary party, and presumably one of the necessary parties must carry the burden of proof. The Employer can add nothing to the Court of Appeal's analysis which relies on the Secretary of Labor's clear regulatory requirement of a *de novo* hearing:

> Neither Section 7 of the Act nor the regulations assign the burden of proof at the administrative hearing. However, for the following reasons we find that the burden is on the physician claiming that his charges are within the prevailing community rates. As the Board properly noted, under section 702.415 a party may request an administrative hearing pursuant to 5 U.S.C. § 556.

Therefore, subsection (d) of that provision, which states "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof," is applicable. This placing of the burden of proof is consistent with the traditional common law rule, noted by the administrative law judge, that the proponent - the one who seeks to establishes the affirmative of an issue—caries the burden of proof. *Selma, Rome & C. Railroad v. United States*, 139 U.S. 560, 567 (1891); *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947).

Although the Board identified the proper rule regarding the burden of proof, it incorrectly applied the rule. Holding that NNS was "the proponent of an order ruling that Dr. Loxley's medical fees exceed the prevailing community charges," the Board assigned the burden to NNS. We find the administrative law judge's analysis more compelling. From a procedural perspective, the fact that NNS requested the hearing does not, *ipso facto*, make it the proponent of the issue. *The request for an administrative hearing by NNS was not, nor do the regulations provide for, an appeal from the finding of the Deputy Commissioner. Rather, the administrative hearing is a de novo proceeding which examines the same issue confronted by the Deputy Commissioner.* This fact compels us to make two observations: First, *it was Loxley, not NNS, who initiated proceedings to clarify whether his rate was within the prevailing rate.* Thus, the issue before the administra-

> tive law judge was raised by Loxley, not NNS. Second, as the administrative law judge noted, to hold that NNS carried the burden of proof at the hearing would effectively accord "a presumption of correctness to the Deputy Commissioner's ruling—an approach antithetical to the concept of a *de novo* hearing" before the administrative law judge.
>
> The regulations which govern the administrative hearing before the administrative law judge also support these conclusions. Section 702.416, a provision which the Board did not address in reaching its conclusion, states that "[a]t formal hearings held pursuant to § 702.415, the necessary parties shall be the person whose fee or cost charge is in question and the Director, or their representatives." The language of this regulation gives credence to our conclusion that one of the "necessary parties" must bear the burden of proof, and that language identifies a "necessary" party as a "the person whose fee or cost charge is in question." Whether the burden is assigned to "the Director" or to the "person whose fee or cost charge is in question" under the portion of the regulations, it is a reasonable conclusion that such burden is not assigned to one in the position of NNS.

Appendix at 18-21 (emphasis added).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE P. POSTOL
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 500
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4004
(202) 463-2400

Counsel for Respondent Newport News Shipbuilding and Dry Dock Company

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